Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Modifying the Commission's Process to Avert	)	
Harm to U.S. Competition and U.S. Customers	)	IB Docket No. 05-254
Caused By Anticompetitive Conduct	)	

COMMENTS OF AT&T CORP.

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EXECUTIVE SUMMARY

AT&T Corp. ("AT&T") welcomes this Notice of Inquiry ("Notice") on how the Commission's anti-whipsaw policies and procedures may be further improved to protect U.S. consumers from the adverse effects of this anticompetitive foreign carrier conduct. The Commission has repeatedly made clear that it will not allow dominant foreign carriers to harm the U.S. public interest by blocking circuits and services or threatening such conduct to force U.S. carriers to agree to higher termination rates, and the Notice underscores the Commission's continued strong commitment to ensuring that U.S. carriers and U.S. consumers are not disadvantaged in this way.

Regrettably, competition has not yet developed sufficiently in many countries to remove potential whipsaw concerns, and the fast-growing volumes of U.S. international calls to foreign mobile networks provide new opportunities for foreign carriers to engage in this misconduct. The Commission emphasized in the 2004 *ISP Reform Order* that whipsaw conduct may still disrupt U.S. carrier negotiations and harm U.S. competition on many U.S. international routes, including routes where U.S. carriers negotiate market-based arrangements and where rates are below benchmark levels.

The Commission now undertakes this Inquiry to examine whether additional remedies and procedures should be adopted to address the threatened and actual circuit blockages that may be used to whipsaw U.S. carriers that resist increases in foreign termination rates. AT&T strongly supports this important initiative and is pleased to submit comments on possible modifications in existing rules and procedures. As described below, AT&T believes that certain changes or clarifications in existing rules and procedures would help ensure that U.S. carriers are not subject to this coercive conduct when they seek to negotiate market-based rates with

dominant foreign carriers and that U.S. consumers enjoy competitive prices for international calls.

As a threshold matter, the Commission should not limit the scope of service-affecting action by dominant foreign carriers that may be addressed through its anti-whipsaw rules and procedures. Some disruptions involve complete blockages of all services, but foreign carriers controlling the foreign end of U.S. international routes may favor or disfavor a U.S. carrier in many other ways. Such carriers also may block, or threaten to block, a particular service in which they seek to raise rates, such as home country direct services, inbound 800 services or calls to foreign mobile networks, or take a wide range of possible actions to degrade service-quality. Alternatively, they may retaliate against a U.S. carrier simply by terminating its operating agreement. The Commission's anti-whipsaw rules should address all these forms of coercion and retaliation.

These rules should address all threats of or actual service disruption in support of efforts to force U.S. carriers to pay non-cost-based increases in termination rates. There certainly should be no exception for efforts to increase rates for inbound international calls purportedly to pay for foreign domestic network expansion or so-called "universal service" purposes, when no similar charges are imposed on their domestic and outbound international services. Threatened or actual service disruption to coerce compliance with these highly discriminatory and non-cost-based rate increases has the same adverse effects in the U.S. market as other whipsaw conduct and requires the same response.

To provide more expedited relief, complaints alleging foreign carrier circuit disruption should be subject to a shorter pleading cycle of five days for comments and two days for replies, as suggested by the Notice (¶ 9). AT&T also supports the further suggestion by the Notice (¶ 10)

that expedited interim measures should also be available to address foreign carrier threats of circuit disruption under procedures that allow swift action in urgent circumstances. To allow U.S. carriers to rely on commercial mechanisms to resolve disputes wherever possible, however, these measures should be applied only where U.S. carriers request such action.

The Commission also often plays a very important role by intervening through direct contacts and correspondence with foreign regulators and foreign carriers when it is informed that a foreign carrier has threatened to block services, to emphasize that the Commission will, if necessary, take action to prevent harm to U.S. competition. AT&T greatly appreciates and fully supports the continuation of this established and very successful approach, which is often sufficient to resolve the matter expeditiously without any need for further action.

If U.S. carriers nonetheless require interim relief because of continuing foreign carrier threats of circuit disruption, the Commission should apply the same presumption of harm to the public interest when U.S. carriers show they have received credible threats that it applies when U.S. carriers show they are subject to circuit disruptions. AT&T believes that the most appropriate relief in these circumstances is likely to be a prohibition on the payment of any increased rate until the threat of network or service disruption is removed. This remedy would deny the foreign carrier any ability to obtain increased rates through its coercive conduct, while allowing continued payments at the existing level to encourage the continuation of operations and services.

Finally, there is no basis to allegations by foreign government officials cited by the Notice (¶ 12) that U.S. carriers do not reflect lower settlement rates in their prices. FCC 43.61 data demonstrate that U.S. carrier price reductions since 1997 have exceeded reductions in settlement costs by more than 160 percent.

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AT&T Corp. ("AT&T") hereby submits its Comments in response to the Commission's Notice of Inquiry on modifying the Commission's procedures to prevent harm to U.S. competition from the effects of "whipsaw" conduct by foreign carriers.[1]

I. THE NOTICE AFFIRMS THAT THE COMMISSION WILL CONTINUE TO ENSURE THAT U.S. CARRIERS ARE NOT DISADVANTAGED BY WHIPSAW CONDUCT.

AT&T welcomes this opportunity to comment on possible improvements to the Commission's tools and procedures to prevent foreign carriers from disrupting commercial negotiations by engaging in whipsaw conduct to force U.S. carriers to accept higher termination rates. As the Commission reaffirmed last year in the *ISP Reform Order*, this conduct "directly harms the public interest" by raising rates to U.S. consumers, impeding call completion and

[1] FCC 05-152 (rel. Aug. 15, 2005) ("Notice").

reducing call quality.[2] This anticompetitive conduct also causes further harm to the public interest by obstructing progress toward the Commission's important and longstanding goal of reducing international termination rates to cost-based levels.[3]

The Commission is fully authorized to prevent this whipsaw conduct and Commission rules and policies have long prohibited foreign carriers from harming U.S. competition in this way.[4] In accordance with this precedent, the 1996 *Argentina Order* stated that "[t]he Commission will not allow foreign monopolists to undermine U.S. law, injure U.S. carriers or disadvantage U.S. consumers."[5] Similarly, the Commission's 2003 enforcement order on the U.S.-Philippines route and its adoption of new competitive safeguard procedures last year in the

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[2] *International Settlements Policy Reform*, First Report and Order, 19 FCC Rcd. 5709, ¶ 45 (2004) ("*ISP Reform Order*"). *See also, id.* (finding "that there is a rebuttable presumption of harm to the public interest if U.S. carriers demonstrate in their petitions that they have suffered network disruptions by foreign carriers with market power in conjunction with their allegations of anticompetitive behavior, or 'whipsawing'").

[3] *1998 Biennial Regulatory Review, Reform of the International Settlements Policy and Associated Filing Requirements,* 14 FCC Rcd. 7963, ¶ 9 (1999) ("*1999 Settlements Reform Order*") (authorizing rejection of agreements not serving "the public interest in achieving cost-based rates"); *International Settlement Rates*, 12 FCC Rcd. 19,806, ¶ 101, n.176 (1997) ("*Benchmarks Order*") ("We reiterate that our goal is ultimately to achieve settlement rates that are cost-based.").

[4] *See, e.g., Cable & Wireless P.L.C. v. FCC,* 166 F. 3d 1224 (D.C. Cir. 1999); *Atlantic Tele-Network, Inc.* v. FCC, 59 F. 3d 1384 (D.C. Cir. 1995) (affirming the Commission's broad authority to regulate the U.S. international telecommunications market to promote the public interest); *Mackay Radio & Telegraph Co.*, 2 FCC 592 (1936), *aff'd by the Commission en banc,* 4 FCC 150 (1937), *aff'd sub nom Mackay Radio & Telegraph Co. v. FCC*, 97 F. 2d 641 (D.C. Cir. 1938) (denying Section 214 application with settlement term that would have allowed foreign carrier to "whipsaw" U.S. carriers). *See also, AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, 19 FCC Rcd. 9993, ¶ 18, n.64 (2004) ("*Philippines Order On Review*") ("The Commission's policy of protecting the public interest from anticompetitive behavior goes back over sixty years.")

[5] *AT&T Corp., Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina*, 11 FCC Rcd. 18,014, ¶ 1 (1996) ("*Argentina Order*").

ISP Reform Order emphasized the paramount importance of the Commission's anti-whipsaw policy in preventing anticompetitive conduct on U.S. international routes that are no longer subject to the ISP and where rates are below benchmark. The Notice (¶ 1) now asks for comment on how the Commission may respond even "more effectively to [] anticompetitive or 'whipsawing' conduct" and further underscores the Commission's continued strong commitment to ensuring that U.S. carriers are not unfairly disadvantaged in their negotiations with dominant foreign carriers.[6]

These Commission policies provide a critical safeguard for U.S. carriers and consumers. While competitive market forces exercise an important constraint on the abuse of foreign market power, competition has not yet developed sufficiently in many countries to remove potential whipsaw concerns. A large number of foreign telecommunications markets are now competitive, but in many countries competition remains non-existent or not well-developed.[7]

Additionally, the rapid world-wide growth of mobile networks, and the increasing numbers of U.S. international calls terminating on those networks under "Calling Party Pays" ("CPP") regimes, now provide foreign carriers with new and growing whipsaw opportunities. Significantly, two of the three recent instances of "whipsaw-type" conduct cited by the Notice (¶

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[6] The Commission also has made clear that "its policies regarding foreign market power abuses apply" also where there is other anticompetitive behavior, such as "where multiple carriers in a foreign market are under common control or act pursuant to anticompetitive government mandates." *ISP Reform Order*, ¶ 35, n.92. *See also*, *1999 Settlements Reform Order*, ¶ 29 ("a foreign carrier that otherwise might lack market power might possess some ability unilaterally to set rates for terminating U.S. traffic due to government policies or collusive behavior in the foreign market.")

[7] In fact, the large majority of foreign countries still have not opened their international telecommunications markets to competition. *See, e.g., TeleGeography 2005* (Nov. 2004), at 71 (reporting that "more than 56 countries" had opened their international long distance markets to

(Footnote continued on next page)

4) – in Ecuador and Nicaragua – have concerned blockages of U.S. calls to foreign mobile networks.

The Commission emphasized the continued importance of its anti-whipsaw policies last year in the *ISP Reform Order* when it gave U.S. carriers additional flexibility to negotiate market-based arrangements by removing the International Settlements Policy ("ISP") from the large majority of international routes. The Commission found that "on some routes, including benchmark-compliant routes where settlement rates often indicate responsiveness to global market forces, foreign carriers are able to leverage their market power and require U.S. carriers to pay above-cost settlement rates while paying rates that are closer to cost for termination in the U.S. market."[8]

Because of its concern that anticompetitive conduct by foreign carriers may still disrupt commercial negotiations and harm U.S. competition, the Commission reaffirmed the importance of competitive safeguards in the *ISP Reform Order* and established new complaint procedures. The Commission also made clear that it would "respond to petitions and notifications when addressing anti-competitive harms, including rates not based on costs, with regard to mobile termination rates."[9]

The Commission now asks for comment on ways in which its anti-whipsaw policies may be further improved. AT&T welcomes this new initiative by the Commission to develop more comprehensive tools to provide U.S. carriers with additional relief against threats of circuit

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competition by 2003, which comprise only about a quarter of U.S. international routes).

[8] *ISP Reform Order*, ¶ 24.

disruption. Such action will help ensure that U.S. carriers are able to negotiate on an equal basis with all foreign carriers and promote the public interest in ensuring that U.S. consumers enjoy competitive prices in making international calls. The adoption of additional anti-whipsaw measures by the Commission will continue to underscore that whipsaw conduct against U.S. carriers will not be tolerated and further discourage foreign carriers from engaging in this anticompetitive behavior.

II. COMMISSION ANTI-WHIPSAW RULES SHOULD ADDRESS ALL SERVICE-AFFECTING CONDUCT RESULTING FROM THE EXERCISE OF FOREIGN MARKET POWER.

The Notice first asks (¶ 8) how circuit disruptions or blockages should be defined and whether disruptions to particular services and service degradations should also be addressed. The Commission has emphasized that whipsawing includes "a broad range of anticompetitive behaviors by foreign carriers possessing market power, in which the foreign firms exploit that market power in negotiating settlement rates with competitive U.S. telecommunications carriers."[10] As noted above, the Commission has found that these concerns apply equally to foreign non-dominant carriers that engage in this harmful conduct by acting either in concert with other carriers or pursuant to anticompetitive government mandates.

While disruptions to U.S. carrier circuits and services in settlement rate negotiations with U.S. carriers frequently take the form of complete blockages of all or some outbound services, a foreign carrier that controls the foreign end of a U.S. international route may advantage or

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[9] *Id.*

[10] *Philippines Order On Review*, ¶ 18.

disadvantage any U.S. carrier in many ways. Accordingly, the Commission should not limit the scope of service-affecting action that may be addressed through its anti-whipsaw remedies.

1. The Commission Should Continue to Intervene to Prevent Disruption of Individual Services.

The circuit blockages addressed by the Commission's anti-whipsaw orders on the U.S.-Philippines and U.S.-Argentina routes generally prevented all direct calling to these destinations, but foreign carriers may also engage in actual or threatened circuit disruptions in particular services for which they seek to increase rates or that they select for retaliatory action, such as home country direct services, inbound 800 services, or calls to foreign mobile networks. As noted above, two recent foreign carrier circuit blockages in Nicaragua and Ecuador have focused on U.S. calling to mobile networks. The fast-increasing volumes of U.S. international calls terminating on foreign mobile networks, and the efforts by many foreign mobile carriers in CPP regimes, and by their affiliated foreign international carriers, to increase termination rates for those calls, raises the possibility of further such blockages in the future.[11]

The Commission made clear in the *ISP Reform Order* that "threatening or carrying out circuit disruptions in order to achieve rate increases" may require intervention.[12] Engaging in retaliatory action "as opposed to resolving disagreements through commercial negotiations, is

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[11] *See generally, The Effect of Foreign Mobile Termination Rates on U.S. Customers*, IB Docket No. 04-398, Comments of AT&T Corp., filed Jan. 14, 2005; Reply Comments of AT&T Corp., filed Feb. 14, 2005. *See also*, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eighth Report, 18 FCC Rcd 14783, ¶ 208 (2003) (noting that "a widely accepted explanation" of high mobile termination rates is that "CPP confers a form of market power on mobile operators with regard to the setting of mobile termination charges").

[12] *ISP Reform Order*, ¶ 44.

unlikely ever appropriate or justified in the public interest and does not benefit the provision of international services to customers in the U.S. or abroad."[13] These concerns address any type of network or service disruption that causes harm to U.S. competition, and apply whether a particular service disruption is limited to one type of traffic, or one portion of the network, or whether it affects all traffic on a particular route.

In accordance with this approach, the International Bureau dismissed claims in the recent Philippines case that blocking limited to one type of U.S.-outbound traffic on the relevant route – "offnet" traffic terminating on the networks of other foreign carriers – did not constitute whipsaw activity, and the Commission upheld this finding.[14] The International Bureau also has made clear that a monopoly foreign carrier "whipsaw[s] U.S. carriers" and harms the U.S. market by engaging in discriminatory behavior in negotiations for Home Country Direct services.[15] Thus, Commission intervention may be just as necessary where a foreign carrier disrupts a particular service in support of such discrimination as where a broader range of services are affected. The Commission's anti-whipsaw rules and procedures should continue to apply in all these circumstances.

2. Foreign Carrier Whipsaws Also Cause Service Disruption Through Degradations in Service Quality and Unreasonable Contract Terminations.

In addition to blocking or disrupting circuits or services, foreign carriers that control the foreign end of U.S. international routes may exploit that market power in settlement rate

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[13] *Id.*, ¶ 45.

[14] *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, 18 FCC Rcd. 3519, ¶ 12 (2003) ("*Philippines Order*"); *Philippines Order On Review*, ¶¶ 12, 17.

[15] *AT&T Corp., MCI International, Inc.*, 12 FCC Rcd. 13,378 (1997).

negotiations to favor or disfavor any U.S. carrier by harming service quality.[16] The wide range of potential service-affecting actions by which a dominant foreign carrier may reduce the quality of a disfavored U.S. carrier's international calls is indicated by the Commission's rules for dominant foreign carriers' U.S. affiliates. U.S. carriers affiliated with dominant foreign carriers are required to file quarterly provisioning reports showing, among other things, "the average time intervals between [circuit and service] order and delivery; the number of outages and intervals between fault report and service restoration; and for circuits used to provide international switched service, the percentage of 'peak hour' calls that failed to complete."[17]

To prevent foreign dominant carriers from using their control of service quality to engage in whipsaw conduct that discriminates among U.S. carriers, the Commission's anti-whipsaw policies should avoid any narrow definition of circuit disruption and should address any service degradation by a foreign carrier with market power that is designed to disadvantage a U.S. carrier during settlement rate negotiations. All such actions may require Commission intervention in response to U.S. carrier complaints.

Foreign carriers also abuse market power and disrupt services when they retaliate by terminating operating agreements with U.S. carriers that oppose rate increases or press for lower rates in settlements negotiations. These unreasonable contract terminations have the same adverse impact on U.S. competition as the blockage of traffic and should be addressed in the

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[16] *See, e.g., Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23,891, ¶ 267 (1997) ("we find that a foreign carrier's ability to control foreign terminating facilities and services, over which we lack direct regulatory oversight, pose a risk of discrimination in the provisioning of U.S. international services that could harm competition in the U.S. market").

[17] 47 C.F.R. Sect. 63.10(c)(4).

same way. U.S. carriers should not be denied the ability to terminate traffic with a dominant foreign carrier when they resist rate increases or attempt to negotiate more cost-based rates, whether the foreign carrier acts by blocking circuits or by terminating U.S. carriers' operating agreements.

Foreign carriers engage in further market power abuse when they seek to require U.S. carriers to accept unreasonable conditions in operating agreements, such as conditions allowing termination of those agreements on very short notice or prohibiting the use of third country routing arrangements to avoid an unreasonably high inbound rate. The Commission, therefore, should also address these types of abuses when a U.S. carrier asks for assistance.

3. Commission Remedies Should Address All Circuit Disruption by Dominant Foreign Carriers.

As the Notice describes (¶ 13), some foreign countries now seek to recapture the U.S. consumer subsidies they formerly received through high international settlement rates by increasing rates for inbound international calls to support their domestic network expansion and so-called "universal service," while placing no similar burden on their own domestic or outbound international services.

The Commission made clear almost ten years ago in the international settlement rate benchmarks proceeding that there is no basis to claims that "universal service requirements [should] be financed disproportionately through settlements revenues."[18] Likewise, subsidizing foreign domestic networks and services through termination rate increases is highly discriminatory, often entirely non-transparent, and places a huge and unfair burden on U.S.

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[18] *Benchmarks Order*, ¶ 148.

carriers and U.S. consumers.[19]

Raising rates in this way is no different from the imposition of other foreign "rate floors" that, as the Commission has found, "disrupt normal commercial negotiations in order to force U.S. carriers to accept above-cost settlement rate increases that would be passed on to U.S. consumers."[20] Moreover, efforts by dominant foreign carriers to charge these discriminatory and non-cost-based rate increases may be accompanied by threats of circuit disruption and service termination similar to those made in support of other foreign carrier efforts to increase termination rates.

The threat of or actual circuit disruption undertaken to obtain these discriminatory rate increases has the same adverse effects in the U.S. market as other forms of whipsawing, by forcing U.S. carriers to comply lest they lose traffic and customers to other U.S. carriers that agree to pay these additional fees, and thus forcing higher rates on U.S. carriers and consumers. The Commission should respond to threats of or actual circuit disruption of this type no differently than to any other form of whipsaw conduct in support of attempted rate increases.

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[19] It is highly inequitable to require inbound international calls to provide the sole support for foreign universal service policies, and thus to impose those costs on U.S. consumers – particularly when foreign consumers provide *no* support for the U.S. universal service fund. *See* 47 C.F.R. Sect. 54.709(a)(1) ("For funding the federal universal service support mechanisms, the subject revenues will be contributors' interstate and international revenues derived from [U.S.] *domestic end users* for telecommunications or telecommunications services") (emphasis added); *Benchmarks Order*, ¶ 148 ("Universal service in the United States is based on and uses end user telecommunications revenues in the United States, *not settlements paid by foreign carriers*.") (Emphasis added.)

[20] *ISP Reform Order*, ¶ 44. Rate increases to support domestic network expansion and universal service objectives are, by definition, not cost-based, because they are not based on "the costs incurred by foreign carriers to terminate international traffic." *Benchmarks Order*, ¶ 29.

III. A SHORTER COMMENT CYCLE WOULD PROVIDE MORE TIMELY ACTION IN RESPONSE TO U.S. CARRIER COMPLAINTS.

As described above, the Commission took the important step the *ISP Reform Order* of establishing new competitive safeguard procedures "as a precautionary measure to address the exercise of foreign market power that may erode the benefits of greater flexibility" authorized by that order.[21] These procedures allow U.S. carriers and other parties to petition for Commission intervention on a route exempted from the ISP by demonstrating anticompetitive behavior harming U.S. customers.[22] The Notice asks (¶ 9) whether a shorter pleading cycle should be adopted for these procedures of five days for comments and two days for replies to provide more expedited relief against anticompetitive conduct.

AT&T proposed this shorter pleading cycle in the *ISP Reform Order* proceeding and continues to support this approach. The Notice recognizes (*id.*) that circuit disruptions and blockages require swift action by the Commission, because "the commercial realities of the market create an incentive for carriers to accept the terms and conditions imposed by foreign carriers that disrupt circuits." The Notice also expresses concern (¶ 5) that the existing procedures do not allow the Commission to act sufficiently quickly in these circumstances and AT&T agrees that relief against circuit disruption should be available to U.S. carriers on a more timely basis. The pleading cycle proposed by the Notice would still allow interested parties a reasonable opportunity to comment, particularly as all record information in these proceedings is available on the Commission's web-site. This shorter pleading cycle should apply to all complaints alleging foreign carrier circuit disruption.

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[21] *Id.*, ¶ 46.

III. EXPEDITED INTERIM MEASURES ARE REQUIRED TO ADDRESS FOREIGN CARRIER THREATS OF CIRCUIT DISRUPTION.

The Commission's competitive safeguard procedures allow interim relief where "significant, immediate harm to the public interest is likely to occur that cannot be addressed through *post facto* remedies."[23] The Notice asks (¶ 10) for comment on the circumstances and process under which interim Commission action should be available where foreign carriers make threats of circuit disruption and blockages in their negotiations with U.S. carriers. In AT&T's experience, such foreign carrier threats may provide little advance notice of the threatened disruption and may therefore require immediate responsive action.

AT&T fully supports the use of expedited interim measures as proposed by the Notice where foreign carriers disrupt commercial negotiations by engaging in this coercive conduct and U.S. carriers request this assistance. Importantly, however, the Commission should also continue its well-established practice, when it is informed that a foreign carrier has threatened to block services, of intervening through direct contacts and correspondence with foreign regulators and foreign carriers to emphasize that the Commission will, if necessary, take action to prevent harm to U.S. competition. If foreign carrier threats nonetheless continue, U.S. carriers should be able to obtain interim relief on an expedited basis.

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[22] *See* 47 C.F.R. Sect. 64.1002(c).

[23] *Id.*, Sect. 64.1002(d). *See also*, Notice, ¶ 10.

1. A Credible Threat of Circuit Disruption May be Conveyed in Any Manner.

As noted above, the *ISP Reform Order* made clear that "threatening or carrying out circuit disruptions in order to achieve rate increases or changes to the terms and conditions of termination agreements . . . has been demonstrated as a means to disrupt normal commercial relations in order to force U.S. carriers to accept above-cost settlement increases that would be passed on to U.S. consumers, and may require Commission action to protect U.S. consumers."[24] In this regard, a "credible threat of circuit disruption or blockage" (Notice, ¶ 10) may be conveyed through any oral or written notification. In whatever manner such a threat is conveyed by a dominant foreign carrier, the U.S. carrier is notified that the foreign carrier is ready to disrupt services to obtain adherence to its demand, and the U.S. carrier may no longer be able to negotiate market-based arrangements because of this coercive conduct.

2. The Commission Should Continue to Intervene with Foreign Regulators in Response to Threats of Circuit and Service Disruption.

The Commission has a long history of intervening directly with foreign regulators in response to threats of circuit termination and other service-affecting conduct by foreign carriers. In January 2003, for example, the International Bureau attempted to prevent threatened network disruptions on the U.S.-Philippines route by informing the Philippines regulator that the Commission would protect U.S. consumers from any abuse of market power.[25] In February 2003, the International Bureau sent a similar letter to a Caribbean regulator in response to network disruption threats, and the Bureau has intervened in a similar manner with foreign regulators on a number of prior occasions in response to threats of or actual network or service

[24] *ISP Reform Order*, ¶ 44.

disruption.[26] The Commission affirmed in the *ISP Reform Order* that its "first response to allegations of anticompetitive conduct in commercial disputes will be to consult with foreign regulators in coordination with appropriate Executive Branch agencies."[27]

AT&T greatly appreciates the very important role that the Commission plays through such intervention in preventing anticompetitive conduct by foreign carriers and fully supports the continuation of this very successful approach. The direct communication of the Commission's awareness of the situation and of the actions it may potentially take to prevent harm to U.S. competition permits a very timely response to such conduct and is often sufficient to resolve the matter quickly without need for any further action.[28]

3. Interim Measures Should be Available on an Expedited Basis.

If foreign carriers nonetheless persist in threatening circuit disruption, U.S. carriers may require interim relief. To allow U.S. carriers to rely on commercial mechanisms to resolve disputes wherever possible, the Commission should only intervene where a U.S. carrier requests this action. Thus, the Commission should not automatically impose any interim conditions on U.S. carriers. Notice, ¶ 10.

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[25] *See Philippines Order*, ¶ 7.

[26] *See, e.g., Argentina Order*, ¶ 6 (in response to circuit disruption on the U.S.-Argentina route, "the International Bureau requested the assistance of the Argentine regulator, the National Telecommunications Commission (CNT), to facilitate the prompt restoration of AT&T's service and to avoid the need for regulatory measures to protect the interests of U.S. carriers and consumers").

[27] *ISP Reform Order*, ¶ 46. *See also*, Notice, ¶ 10, n.24.

[28] Similarly, Commission officials have expressed public concerns about efforts by some countries to raise termination rates. *See* Communications Daily, *FCC's Abelson Concerned by China's Increasing Settlement Rates*, Nov. 25, 2002.

In response to the further questions asked by the Notice (*id.*) concerning the procedures that should apply to this relief, U.S. carriers should be able to request interim relief on an expedited basis by filing written notification with the Commission, with evidence of oral threats of circuit disruption provided by affidavit. U.S. carriers also should be able to obtain confidential treatment of any proprietary or competitively sensitive information contained in their petitions and supporting affidavits or other materials.

The Commission should normally seek comment through public notice on requests for interim relief in response to circuit disruption threats. However, the Commission is not required to provide foreign carriers with this notice and opportunity to comment, and therefore need not follow this practice in urgent circumstances. Notice, ¶ 10. When the Commission takes action in response to foreign carrier whipsaw action, there is "no obligation to serve [the relevant notification] on any foreign carrier or to seek comment from them."[29] The Commission proceeding establishing the relevant enforcement policy more than satisfies any notice requirements that may apply to foreign carriers in these circumstances.[30]

The required showing in such a proceeding should be the existence of a credible threat of network disruption by a foreign carrier with market power in order to achieve rate increases or changes to the terms and conditions of termination agreements. Notice, ¶ 10. The Commission

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[29] *Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Peru*, 14 FCC Rcd. 8318, ¶ 25 (1999). Additionally, the D.C. Circuit has made clear that the Commission is authorized to regulate the rates U.S. carriers pay to foreign carriers, that it may do so specifically to prevent whipsawing, and that the Commission "does not regulate foreign carriers or foreign telecommunications services" when it takes such action. *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1229-30 (D.C. Cir. 1999).

[30] *Argentina Order*, ¶ 23 (foreign carrier "had notice of the rulemaking underlying our ISP, and was therefore on notice the discriminatory practices contravening the ISP would be subject to

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has previously determined that such conduct "may require Commission action to protect U.S. consumers."[31] The Commission has also found that circuit blockage and disruption "as opposed to resolving disagreements through commercial negotiations, is unlikely ever appropriate or justified in the public interest," and has established "a rebuttable presumption of harm to the public interest" if U.S. carriers show in their petitions that they have suffered circuit blockages by foreign carriers with market power.[32] The Commission should apply the same presumption when U.S. carriers establish that they have been threatened with such conduct in ruling on requests for interim relief.

IV. THE COMMISSION SHOULD ADDRESS CIRCUIT DISRUPTION THREATS BY ADOPTING ORDERS TO STOP INCREASED PAYMENTS OR OTHER APPROPRIATE RELIEF.

To address foreign carrier threats of circuit disruption, the Notice proposes (¶ 11) several different forms of relief to those formerly applied where foreign carriers have disrupted circuits, including requiring U.S. carriers to stop increased payments, prohibiting the negotiation of a different rate until the threat is removed, stop payment orders limited to particular durations, and partial (rather than full) imposition of the International Settlements Policy ("ISP") on the relevant route.

AT&T believes that the most appropriate relief in these circumstances is to prohibit the payment of any increased rate until the threat of network or service disruption is removed. As described below, this remedy would deny the foreign carrier any ability to obtain increased rates

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enforcement action").

[31] *ISP Reform Order*, ¶ 44.

through its coercive conduct, while allowing continued payments at the existing level to encourage the continuation of operations and services. The Commission could also prohibit the negotiation of a different rate until disruption threats are removed. In contrast, full stop payment orders are less suitable for these circumstances, even if they are limited in duration, and the full re-imposition of the ISP also does not provide an effective interim remedy.

1. The Commission Should Place Primary Reliance on Orders to Stop Increased Payments.

The purpose of Commission relief to address foreign carrier threats of circuit disruption should be to obtain the removal of the threat while resisting the demanded rate increase and maintaining operations and services on the international route. In determining the appropriate interim relief to be applied in a particular case, the Commission should give great weight to the views of the affected U.S. carriers. However, more narrowly focused remedies are likely to be more successful than full stop payment orders in addressing these circumstances and a requirement to stop increased payments is generally likely to provide the most effective remedy.

A prohibition on the payment of any increased rate would ensure that the foreign carrier would not profit from its coercive conduct, since any U.S. carriers billed for an increase following the issuance of such an order would simply deduct the increase from their settlement statements. At the same time, by allowing the continued payment of rates at the levels agreed to prior to the commencement of this conduct, this remedy would encourage the foreign carrier to maintain circuits and services with U.S. carriers. Allowing these continued payments should also

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(Footnote continued from previous page)

[32] *Id.*

facilitate the restoration of normal commercial negotiations once U.S. carriers are no longer subject to the threat of circuit disruption.

As an additional step, the Commission could also prohibit all negotiations on rates until U.S. carriers are no longer subject to such threats. However, AT&T believes that in most instances an order to stop increased payments will be sufficient to prevent harm from a threat of circuit disruption. Complete stop payment orders – even limited in duration – should not be necessary and may be counterproductive where circuits or services have not been disrupted. A requirement to stop all payments in these circumstances is likely to have a negative impact on the foreign carrier and make the restoration of normal commercial relations on the route a more lengthy and difficult process and may even provoke the very disruption that it seeks to discourage.

2. Re-Imposition of the Full ISP Does Not Provide an Effective Remedy.

The Notice also asks (¶ 11) whether the ISP "or parts thereof" should be re-imposed when there is circuit disruption on a U.S.-international route. While the re-imposition of the ISP is one of the measures that are potentially available in these circumstances, the Commission has recognized that this approach may not be effective. The Commission stated in the *ISP Reform Order* that "the re-imposition of the ISP's requirements may not effectively address the nature of the anticompetitive harm and may cause further detriment to U.S. competition and consumers on a route."[33] Both where foreign carriers threaten to engage in circuit disruption and where they take such action, requiring all U.S. carriers to comply with the full ISP requirements for nondiscriminatory rates, uniform inbound and outbound rates and proportionate return on routes

[33] *Id.*, ¶ 47.

that are subject to commercial arrangements is likely to be very burdensome for U.S. carriers and to obstruct rather than encourage the restoration of normal commercial relations.

Requiring U.S. carriers to increase inbound rates, which is suggested by the Notice (¶ 13 & n.35), would assist in addressing unreasonable increases in foreign termination rates, and would be more consistent with commercial arrangements than the full re-imposition of the ISP. To prevent foreign carriers from avoiding the additional inbound charge by sending U.S.-inbound traffic to another U.S. carrier, all U.S. carriers should be required to increase inbound rates on the relevant route.

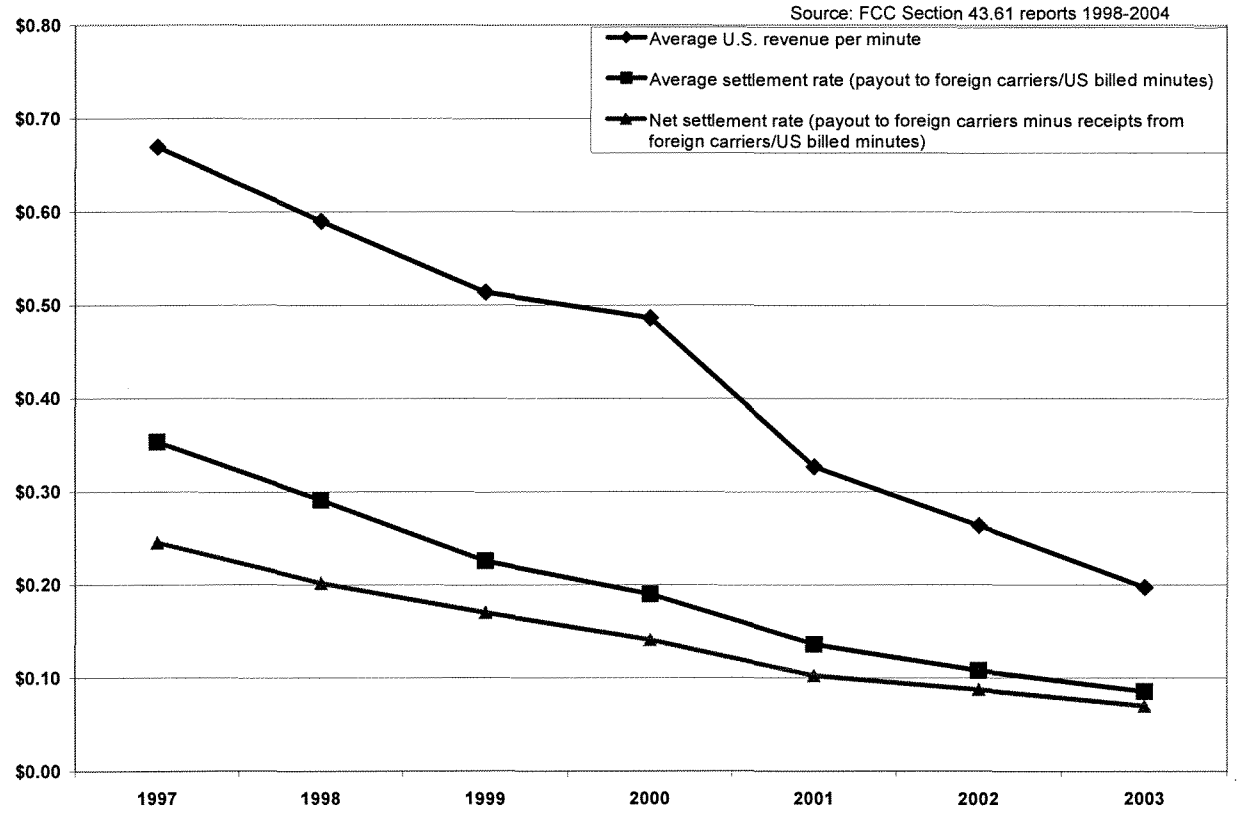
However, with the volume of U.S.-outbound traffic being three or four times greater than the volume of U.S.-inbound traffic on many routes, increasing the inbound rate in accordance with the additional amount charged at the foreign end may not be sufficient to recover the additional foreign carrier charges. Consequently, increasing inbound rates may not by itself provide an adequate disincentive or remedy for unreasonable foreign rate increases and may need to be applied in conjunction with other measures.

V. U.S. CARRIERS FULLY PASS THROUGH REDUCTIONS IN SETTLEMENTS RATES.

Lastly, there is no basis to the allegations by foreign government officials cited by the Notice (¶ 12) that U.S. carriers are failing to reflect lower settlement rates in their end-user prices. FCC data show that U.S. prices have been reduced to a far greater extent than U.S. carriers' settlement rates and payments. As demonstrated by the chart below, between 1997, when the Commission adopted its international settlement rate benchmarks, and 2003, the most recent year for which FCC data is available, the average settlement rate for U.S. international traffic fell from $0.35 to $0.09, a reduction of 26 U.S. cents.

In the same period, average U.S. prices for international traffic fell from $0.67 to $0.20, a reduction of 47 U.S. cents. In the most recent annual period for which this data is available, for 2002-2003, the average settlement rate fell from $0.11 to $0.09, a reduction of 2 U.S. cents, while average U.S. prices fell from $0.26 to $0.20, a reduction of 6 U.S. cents.

U.S. Industry Revenue and Settlements 1997-2003



This data clearly demonstrates that reductions in U.S. settlement rates are more than fully reflected in lower U.S. prices – in accordance with the longstanding view of the Commission that the competitive U.S. market ensures that all reductions in settlement rates are "fully reflected in collection rates."[34]

[34] *Benchmarks Order*, ¶ 270.

Because "settlements savings . . . are reflected in the reduction of *net* settlement payments," the Commission also made clear in the *Benchmarks Order* that the proper measure of "whether U.S. carriers have passed settlement savings on to consumers" is "reductions in net settlements, not reductions in the level of settlement rates."[35] As shown in the chart above, the average U.S. net settlement rate fell from $0.25 to $0.07 between 1997 and 2003, a reduction of 18 U.S. cents, while average U.S. prices fell by 47 U.S. cents.

Thus, U.S. carrier price reductions in this six year period exceeded their reductions in settlements costs by *more than 160 percent*. As the Commission found after reviewing similar data in the *ISP Reform* proceeding, "[b]oth statistical data collected by the Commission and economic theory indicate that reductions in settlement rates are being passed on to U.S. consumers."[36]

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[35] *Id.*, ¶ 274 (emphasis added).

[36] *ISP Reform Order*, ¶ 72.

CONCLUSION

For the reasons set forth above, the Commission should adopt additional measures to discourage foreign carriers from engaging in threats of and actual circuit disruption in support of their efforts to raise rates to U.S. carriers. In particular, the Commission should continue to intervene directly with foreign regulators and carriers in response to foreign carrier threats of anticompetitive conduct, should adopt new interim measures for use on an expedited basis if such threats continue, and should adopt a shorter pleading cycle for U.S. carrier complaints of network and service disruption.

Respectfully submitted,

AT&T CORP.

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Dated: October 7, 2005.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October 2005, I caused true and correct copies of the foregoing Comments of AT&T Corp. to be served on all parties by electronic mail to their addresses listed on the attached service list.

Dated: October 7, 2005

/s/ Hagi Asfaw
Hagi Asfaw

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